CASE NUMBER _____

UNITED STATES SUPREME COURT

DONALD J. SCHUTZ.

Appellant

v.

THE STATE OF WYOMING AND
TOM THORNE, IN HIS OFFICIAL
CAPACITY AS ACTING DIRECTOR
OF THE WYOMING GAME AND FISH COMMISSION,
ET AL., ETC.,

Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Donald J. Schutz
535 Central Avenue
St. Petersburg, Florida 33701
727-823-3222

(a) Question Presented for Review

Do the traditional limits on judicial inquiries into the rational basis of state legislation under the Equal Protection Clause of the Fourteenth Amendment apply to non-resident challenges to state non-resident hunting laws creating disparate treatment of non-residents since a non-resident has no power at the polls of the state that is passing the laws affecting the non-resident?

(b) List of All Parties

Plaintiff: Donald J. Schutz, a resident of the State of Florida.

Defendants: The Game and Fish Commission of the State of Wyoming, consisting of

Tom Thorne
J. Michael Powers
Linda Fleming
Doyle Dorner
Jerry Sanders
Gary Lundvall
Kerry Powers
M. Hale Kreycik

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(d) Citations of the Official and Unofficial Reports of the Opinions and Orders Entered

Schutz v. Thorne, 415 F.3d 1128 (10th Cir., 2005)

Schutz v. State of Wyoming and Tom Thorne, Etc., Et al., 2003 U.S. Dist. Lexis 26518, Case No. 02-CV-165-D, United States District Court for the District of Wyoming (May 28, 2003).

(e) Statement of the Basis for Jurisdiction in this Court.

This Writ of Certiorari lies from a final order of the United States Court of Appeals for the Tenth Circuit affirming a final order of the United States District Court for the State of Wyoming. This Court has jurisdiction for permissive certiorari review pursuant to 28 U.S.C. δ1254 (1).

(f) The Constitutional Provisions, Treaties, Statutes and Ordinances Involved in the Case (Full Text at Appendix)

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution
Wyoming Statute W.S. 23-2-401 (the Guide Statute)
Wyoming Statute W.S. 23-1-703 (the Quota Statute)
Wyoming Statute W.S. 23.2-101 (the Fee Statute)

(g) Statement of the Case

Statement of basis for federal jurisdiction in the court of first instance. This case originally was filed by Schutz against the State of Wyoming Game and Fish Commission, naming the commissioners in their official capacity, in the United States District Court for the District of Wyoming under Federal Question jurisdiction, 28 U.S.C. 1331.

Statement of the Case.

September 12, 2002, Schutz filed Complaint pursuant to 42 U.S.C. 1983 and 28 U.S.C. 2201 against the Wyoming Game and Fish Commission through the Director and other members in their official capacity seeking a declaratory judgment that the Guide Statute, Quota Statute, and Fee Statute violate the United States Constitution.

January 21, 2003, United States District Court entered an order treating the Defendants' Motion to Dismiss as a Motion for Summary Judgment and directing supplemental filings and briefings.

February 27, 2003, Schutz filed Motion for Partial Summary Judgment seeking summary judgment that the Guide Statute was facially unconstitutional.

May 28, 2003, United States District Court entered an Order providing, as it relates to this Petition (1) Schutz has no standing to challenge the Guide Statute (2) Schutz has standing to challenge the Fee Statute and the Quota Statute (3) the correct Standard of Review is "rational basis" and (4) all three statutes are rationally related to a legitimate state interest.

June 24, 2003, Schutz filed Notice of appeal to the United States Court of Appeals for the Tenth Circuit.

July 11, 2005, the United States Court of Appeals affirmed the United States District Court in *Schutz v. Thorne*, 415 F.3d 1528 (10th Cir., 2005).

October 11, 2005, Schutz filed this timely Petition for Writ of Certiorari seeking a review of the July 11, 2005 order of the United States Court of Appeals for the Tenth Circuit.

(h) Argument

Non-residents have no power at the polls, and therefore, except through judicial challenges, non-residents have no power to modify or challenge the enactment and enforcement of irrational state laws that discriminate against non-residents. The application of the traditional maxim that courts will not evaluate the reasoning of legislatures when conducting equal protection reviews based on the rational basis test is premised on the fundamental notion that aggrieved parties have a solution at the polls. When dealing with non-residents and state statutes affecting non-residents, the application of this traditional judicial maxim leaves aggrieved non-residents with no remedy for constitutional injuries. Schutz, a non-resident, was denied a trial on his claims that Wyoming hunting statutes unfairly and illegally discriminate against non-resident hunters. His claims were adjudicated by the District Court on summary judgment. Schutz contends, and contended to the United States Court of Appeals, that he is entitled to a trial. The Court of Appeals rejected his argument, relying on a line of cases that effectively hold that courts may not analyze legislative errors and that the remedy for such legislation is a political solution at the polls. However, Schutz contends that as a non-resident, he has no such solution. The traditional judicial restraint in conducting fact-finding relating to the rational basis of state statutes should not apply when the aggrieved party is a non-resident and has no power at the polls.

Schutz, a non-resident of the State of Wyoming, challenged three Wyoming statutes governing non-resident hunting in Wyoming: (1) the "fee statute" creating a substantially higher monetary amount that a non-resident

pays for a hunting license (2) the "quota statute" that allocates hunting licenses in a way that dramatically limits the ability of non-residents to hunt certain big-game species such as big horn sheep and (3) the guide statute, that requires non-residents to use licensed guides in federal wilderness areas. Schutz was found to have standing to challenge the fee statute and the quota statute, but was found to have no standing to challenge the guide statute.

The only issue that Schutz seeks this Court to review is whether the traditional limits on the judicial review of the rational basis for legislative action applies to non-resident actions challenging state laws affecting non-residents. The Court of Appeals rejected Schutz' challenge relying on *FCC v. Beach Communications,* 508 U.S. 307 (1993) and similar cases. These cases generally stand for the proposition that, " . . . a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data," *Id.,* at 315. Schutz contends that the non-resident hunting requirements are factually unrelated to a rational state interest, and the district court's disposition of his claims on summary judgment was therefore improper. As stated in the opinion of the Court of Appeals, "According to Schutz, the district court erred in dismissing his claim at the summary judgment stage because, in his view, "the analysis of the reasonable relationship of the regulation to the means is a factual question, not a legal issue." Aplt.Op.Br. at 21. Schutz is mistaken," citing *FCC v. Beach Communications,* 508 U.S. 307 (1993) and similar authority.

A reading of the opinion of *FCC v. Beach Communications,* 508 U.S. 307 (1993), seems to indicate that the courts have effectively banned any judicial inquiry into the legitimacy of any legislative reasons, no matter how speculative, to justify a disparate law under a rational basis equal protection review. In this opinion, this Court states, " . . . equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *Id.,* at 313.

While at first blush this may seem dispositive of the issue, because Schutz insists that he is entitled to a judicial inquiry into the speculative reasoning utilized to uphold a rational basis to seemingly irrational non-resident hunting statutes, the following important paragraph in this opinion was not considered by the Court of Appeals in applying this maxim to the claims of the non-resident Schutz:

"The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Id,* at 313, citing *Vance* v. *Bradley*, 440 U.S. 93, 97, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979).

Looking further, this long history of judicial respect for the legislative process is based on the fundamental notion that the electorate can right any irrational wrong of a legislature by acting at the polls. In the 1955 case of *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955), which upheld an Oklahoma law under both the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause, this Court stated, "(f)or protection against abuses by legislatures the people must resort to the polls, not to the courts." *Id.,* at 488.

None of the cases relied upon by the Court of Appeals in denying Schutz a trial on his claims involved a case where the aggrieved party had no power at the polls. Schutz contended to the Court of Appeals that he was entitled to a trial, and the Court of Appeals affirmed summary judgment against Schutz on the theory that legislation will not be subjected to judicial factfinding upon an equal protection challenge relying on cases emanating from the political power of the electorate to modify offending legislation through the power of the polls. Where Schutz, the aggrieved